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in the

Supreme Court

of the

United States

October Term, 1981

RALPH D. TURLINGTON, et al.,
Petitioners

vs.

S-1, a minor, et al.,
Respondents

JAMES C. EDWARDS, et al.,
Petitioners

vs.

S-1, a minor, et al.,
Respondents

On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

Michael R. Masinter
Nova University Center
for the Study of Law
3100 S.W. 9th Avenue
Fort Lauderdale, FL 33315
(305) 522-2300 x135
Counsel for Respondents

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SUMMARY OF ARGUMENT

Following the entry of a preliminary injunction, local defendants reinstated the expelled plaintiffs to the public schools of Hendry County. In accordance with the requirements of the injunction, local defendants have been providing each of the plaintiffs with "a free and appropriate education" with "appropriate placements" as part of an ongoing "individualized education program for each named plaintiff. . . ." While plaintiff S-9 was graduated from the public schools, the remaining plaintiffs are enrolled in or eligible for public school in Hendry County. Because the preliminary injunction imposes continuing obligations upon local defendants respecting the provision of educational services to plaintiffs S-1 through S-8, the judgment of the Court of Appeals has not become moot. Accordingly, the petitions for certiorari seek to review continuing cases and controversies. For the reasons previously stated, those petitions should be denied.

ARGUMENT

BECAUSE THE PRELIMINARY INJUNCTION IMPOSES A CONTINUING OBLIGATION ON LOCAL DEFENDANTS TO DEVELOP AND IMPLEMENT AN INDIVIDUALIZED EDUCATIONAL PROGRAM FOR EACH PLAINTIFF, CONDUCT EVALUATIONS, AND MAKE APPROPRIATE EDUCATIONAL PLACEMENTS IN ACCORDANCE WITH THE EHA, AND LIMITS THE PROCESS BY WHICH LOCAL DEFENDANTS CAN EXPEL PLAINTIFFS OR OTHERWISE CHANGE THEIR EDUCATIONAL PLACEMENT FOR DISCIPLINARY REASONS, IT IS NOT MOOT.

The literal language of the preliminary injunction requires local defendants to provide plaintiffs a "free and appropriate education," to perform "reevaluations as may be required," to "make appropriate placements," and to develop and implement "an individualized education program." All of the operative language derives verbatim from the Education For All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq. (The EHA). The EHA makes clear that each of the obligations imposed by the preliminary injunction is a continuing obligation.

The EHA requires a state to provide handicapped children between the ages of three and twenty-one a free and appropriate education. 20 U.S.C. §1412(2)(B); 45 C.F.R. §121a.300(a). Thus the preliminary injunction imposes upon local defendants the obligation to provide plaintiffs a free and appropriate education until they

graduate, reach the age of twenty-one, or voluntarily withdraw from the public schools.[1]

In educating handicapped children, school officials must establish "an individualized education program for each handicapped child at the beginning of each school year" and must "review and, if appropriate revise, its provisions periodically, but not less than annually." 20 U.S.C. §1414(a)(5). The program must include a statement of present educational performance, short term instructional objectives and annual goals, specific special education and regular education to be provided, and appropriate objective criteria and evaluation criteria and schedules for determining, on at least an annual basis, whether the short term educational objectives are being achieved. 45 C.F.R. §121a.346. Thus the obligation under the preliminary injunction to develop and implement an individualized education program continues through the litigation and imposes specific recurring requirements.

Implementing regulations under the EHA require a full evaluation of each handicapped child at least every three years by a multidisciplinary team utilizing multiple tests and other evaluation materials properly validated and designed to assess specific areas of educational need. 45 C.F.R. §§121a.532, 121a.534. Thus paragraph 1(b) of the preliminary injunction compelling "reevaluations required under 45 C.F.R. §121a.534" imposes a substantial recurring obligation.

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[1]S-9 was graduated in 1981. S-1, S-3, and S-4 are enrolled in the public schools of Hendry County. S-2, S-5, S-6, S-7 and S-8 are not enrolled in public schools.

Finally, 45 C.F.R. §121a.533 controls the process by which education officials can make placement decisions, requiring that changes in placement be based upon a variety of sources of information and be made by a group of persons knowledgable about the child, the meaning of the evaluation data, and the placement options. The preliminary injunction requires local defendants to "make appropriate placements in accordance with 45 C.F.R. §121a.533" in paragraph 1(c) as part of the ongoing process of developing and implementing an individualized education program under paragraph 1(d). Thus the injunction controls throughout this litigation the process by which local defendants make changes in the educational placement of plaintiffs.

In their respective opinions, both courts below held that plaintiffs have a substantial probability of success on the merits of their claims that expulsion from the public schools constitutes a change in educational placement, and that all changes in educational placement including expulsion for misconduct and other disciplinary changes in placement must be accomplished in accordance with the change in placement regulations of the EHA. The injunction specifically requires local defendants "to make appropriate placements in accordance with 45 C.F.R. §121a.533" during the litigation. Because pending a trial on the merits expulsion for misconduct is a change in placement, the preliminary injunction is a continuing limitation on the power of local defendants to expel plaintiffs for misconduct. Consistent with paragraphs 1(c) and (d), defendants can expel plaintiffs only in accordance with the change in placement provisions of 45 C.F.R. §121a.533. Thus, the preliminary injunction limits during the course of this litigation the process

by which local defendants can expel plaintiffs or otherwise make changes in their educational placement for disciplinary reasons.

Each paragraph of the preliminary injunction imposes continuing or recurring obligations on local defendants. The injunction limits the process by which local defendants can punish plaintiffs for misconduct through expulsion or other changes in educational placement, and requires state defendants to supervise compliance. Because compliance with the injunction is an ongoing obligation, the injunction cannot become functus officio. Because the parties retain a legally cognizable interest in the determination of whether the preliminary injunction was an abuse of discretion, the case has not become moot.

CONCLUSION

For the foregoing reasons, this case is not moot. For the reasons stated in their Brief In Opposition to Certiorari, respondents request that the writ be denied.

Respectfully submitted,

MICHAEL R. MASINTER
Counsel For Respondents